Analysis of the 60-Day Grace Period for Nonimmigrant Workers

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The Department of Homeland Security issued final regulations on November 17, 2016 entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers" to provide relief to high skilled workers born mainly in India and China who are caught in the crushing backlogs in the employment-based preferences. The rule took effect on January 17, 2017. My prior blog analyzed the key provisions of the rule. This blog examines the provision that authorizes a 60-day grace period for workers whose jobs get terminated while employed in nonimmigrant status.

The rule provides two grace periods to nonimmigrant visa holders. 8 CFR 214.1(l)(1) provides for a 10-day grace period at the start and end of the validity period for E-1, E-2, E-3, H-1B, L-1 and TN nonimmigrant workers [note that H-2B, H-3, O and P nonimmigrants already enjoy 10-day grace periods in existing regulations]. 8 CFR 214.1(l)(2) allows E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1or TN nonimmigrant workers a grace period of 60 days based upon a cessation of their employment. The 60-day grace period is indeed a salutary feature. Up until January 17, 2017, whenever workers in nonimmigrant status got terminated, they were immediately considered to be in violation of status. There was also no grace period to depart the United States. Therefore, if a worker got terminated on a Friday, and did not depart on the same day, but only booked the flight home on Sunday, this individual would need to disclose on a future visa application, for all times, that s/he had violated status. Derivative family members, whose fortunes were attached to the principal's, would also be rendered out of status upon the principal falling out status. Thus, the 60-day grace period not only gives the worker more time to leave the United States, but it also provides a window of opportunity to transition to another employer who can file an extension or change of status within the 60-day period. Similarly, the worker could also potentially change to some other status on his or her own, such as to F-1, after enrolling in a school. Prior to January 17, 2017, nonimmigrant workers who fell out of status upon cessation of their employment, and sought a late extension or change of status had to invoke the USCIS's favorable discretion pursuant to 8 CFR 214 .1(c)(4) and 8 CFR 248(b)(1)-(2) by demonstrating, among other things, extraordinary circumstances.

Several questions have come up relating to when the 60-day grace period will trigger and how often can it be used. It would be useful to reproduce the provisions authorizing grace periods in their entirety for purposes of analyzing these questions.

§214.1 Requirements for admission, extension, and maintenance of status

(l) *Period of stay*. (1) An alien admissible in E-1, E-2, E-3, H-1B, L-1, or TN classification and his or her dependents may be admitted to the United States or otherwise provided such status for the validity period of the petition, or for a validity period otherwise authorized for the E-1, E-2, E-3, and TN classifications, plus an additional period of up to 10 days before the validity period begins and 10 days after the validity period ends. Unless authorized under 8 CFR 274a.12, the alien may not work except during the validity period.

(2) An alien admitted or otherwise provided status in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN

classification and his or her dependents shall not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of the employment on which the alien's classification was based, for up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, once during each authorized validity period. DHS may eliminate or shorten this 60-day period as a matter of discretion. Unless otherwise authorized under 8 CFR 274 a.12, the alien may not work during such a period.

(3) An alien in any authorized period described in paragraph (l) of this section may apply for and be granted an extension of stay under paragraph (c)(4) of this section or change of status under 8 CFR 248.1, if otherwise eligible.

The answers to the questions I raise are not definitive as all of them involve a case of first impression, although some are based on the DHS's responses to comments in the preamble, and USCIS may disagree. I do hope, however, that my attempted responses will be helpful for those who need to claim the grace period in situations that are not so clear cut.

How many times can I use the 60-day grace period?

The rule at 214.1(l)(2) states that you are entitled to the 60-day grace period "once during each authorized validity period." 214.1(l)(1) defines validity period as a nonimmigrant who "may be admitted to the United States or otherwise provided such status for the validity period of the petition, or for a validity period otherwise authorized for the E-1, E-2, E-3, and TN classifications, plus an additional period of up to 10 days before the validity period begins and 10 days after the validity period ends."

It thus appears that you are entitled to the 60-day grace period once during each validity period of the petition. Take for example an individual who has been admitted into the US under an H-1B visa petition with a validity period till December 31, 2017. If she gets terminated from her job with Company A, she will be entitled to the 60-day grace period that allows her to maintain H-1B status despite the cessation of employment. She finds a new job with Company B, which files an H-1B petition and extension of status within this 60-day period, resulting in an H-1B petition that is valid from August 1, 2017 to August 1, 2020. She arguably is now within a new validity period. If she gets terminated again by Company B, she should be able to seek another 60-day grace period.

The following extract from the preamble can aid us in this interpretation:

An individual may benefit from the 60-day grace period multiple times during hir or her total time in the United States; however, this grace period may only apply one time per authorized nonimmigrant validity period.

What if the new validity period filed by new employer Company B ends on the same date as the validity period of the petition filed by Company A?

Let's now assume that December 31, 2017 is the final sixth year of this individual's time spent in H-1B status. When the new employer, Company B, files the H-1B petition during the 60-day grace period, she is only entitled to H-1B status until December 31, 2017, which is the same validity period as the prior H-1B petition of Company A. If Company B terminates her, will she be entitled to a new 60-day grace period? The preamble to the final rule provides this guidance: "DHS clarifies that, while the grace period may only be used by an individual once during any single

authorized validity period, it may apply to *each* authorized validity period the individual receives." Although the end date of Company B's H-1B petition, December 31, 2017, is the same as Company A's, this is arguably still a new validity period even though it ends on the same day as the prior validity period. Therefore, she can argue that she is entitled to a new 60-day grace period. A new validity period should not be defined as having a different time frame from the older validity period; rather a new validity period resulted because of an extension request through a different petition. However, it is possible that USCIS may reach a different conclusion.

I got laid off by my employer while in H-1B status because the employer did not have enough business. Within 60 days, the employer got new business and rehired me again. Can I just resume employment with that employer without filing a new extension of status petition or leaving and returning to US again in H-1B status?

The purpose of the rule, especially at 214.1(l)(3), is to allow a worker to change or extend status within the 60-day period or to depart the US. However, if the worker is still within the validity period under H-1B classification, then arguably this worker can resume employment with the same employer. The worker never lost status during that 60-day grace period, and if joining the same employer, may not need to file an extension with the same employer. This is also a situation where the worker would most likely not be able to get a second 60-day grace period within the validity period of the same petition or admission. Legacy INS has indicated that when an H-1B worker returns to the former employer after a new extension of status has been filed through the new employer, the first company need not file a new H-1B petition upon the H-1B worker's return as the first petition remains valid. See Letter, LaFluer, Chief, Business and Trade Branch, Benefits Division, INS, HQ 70/6.2.8 (Apr. 29, 1996); Letter, Hernandez, Director, Business and Trade Services, INS (April. 24, 2002).

Note, however, that if the employer laid off the H-1B worker, and did not notify USCIS regarding the termination, the employer could still potentially be liable for back wages under its obligation to pay the required wage under the Labor Condition Application for failing to effectuate a bona fide termination. See *Amtel Group of Fla., Inc. v. Yongmahapakorn, ARB No. 04-087,* ALJ No. 2004-LCA-0006 (ARB Sept. 29, 2006). Therefore, if the employer notified the USCIS, which resulted in the withdrawal of the H-1B petition, and the same employer files a new H-1B petition within the 60-day grace period, it could arguably create a new validity period. If the employee is terminated for a second time, it may be possible to argue that he is entitled to a new 60-day grace period.

Can I carry over unused days if I do not use all 60 days of the grace period?

The 60 days must be used consecutively and any unused days may not be used later in the same validity period or carried over into a subsequent validity period.

What if my job gets terminated when there are less than 60 days left of my nonimmigrant status?

The rule clearly states that you are entitled to a grace period of 60 consecutive days or until the end of the authorized validity period, whichever is shorter.

Can I get an additional 10 days grace period beyond the 60-day grace period?

In most cases the answer is “No”. However, there may be an exception where the cessation of employment was within the last 60 days of the validity period, and the worker was provided with a grace period of 10 days upon his last admission to the US. Under this limited case, the DHS will consider the nonimmigrant to have maintained status for 60 days immediately preceding the expiration of the validity period plus an additional 10 days. If the cessation of employment occurred when there were only 30 days left before the end of the validity period, then the individual should conceivably be able to claim a 30-day grace period plus 10 days.

Prior to my validity period ending in L-1A status, the same employer filed an extension of status, which got denied after the end of the prior validity period in L-1A status. Am I entitled to the 60-day grace period?

No. There is no grace period after an approved validity period has ended and when an extension of stay has been denied after that period. The 60-day grace period is intended to apply to individuals whose employment ends prior to the end of their approved validity period.

I ported while in H-1B status from Company A to Company B, and the petition for new employment is denied prior to the expiration of the validity period of the previous petition. Am I entitled to a 60-day grace period?

Yes. In this scenario, and as the preamble to the rule suggests, you will be entitled to a 60-day grace period. However, you will not be entitled to the grace period if the extension request is denied after the expiration of the validity period of the H-1B petition of Company A.

At issue is whether the grace period will be available if the same Company B files the H-1B again or must a new Company C file the new employer and extension petition? Since the grace period is applicable to the worker upon cessation of employment, it should not matter whether Company B or Company C files the new H-1B extension. However, readers should be forewarned that the USCIS still has discretion in determining whether the 60-day grace period is applicable or not. If Company B’s petition was denied for egregious reasons relating to fraud, the USCIS may likely not exercise its discretion favorably with respect to honoring the grace period.

Does it matter whether the employer terminates me or I leave the employer in order to be entitled to the 60-day grace period?

214.1(l)(2) states that the 60-day grace period triggers “on the basis of a cessation of the employment on which the alien’s classification was based.” Therefore, arguably it should not matter whether the termination occurred on the employer’s or the employee’s initiative. Again, the USCIS has discretion to decide whether a grace period will be applicable on a case by case basis.

Can I work during either the 60-day or 10-day grace period?

No. Because the rule was meant to facilitate the ability of nonimmigrants to transition to new employment, seek a change of status or depart the US, the rule clearly prohibits any form of employment.

The preamble to the rule even suggests that a nonimmigrant worker may not use the 60-day or 10-day period to work to start their own businesses too. However, if the activities for starting a business do not constitute work, especially if they would be permissible “non-work” activities

under the B-1 visa, then one could argue that the person did not engage in prohibited activity during the grace period. However, this is risky given that the preamble has not made any distinction between work and non-work activities relating to the startup of a business.

Can I travel during either the 60-day or 10-day grace period in case of an emergency?

Although the rule is silent about travel, it is strongly advised that the nonimmigrant worker not travel during any of the grace periods. When the individual returns from the trip abroad, he or she will not be coming to join an employer and CBP will most likely not admit her. One of the purposes of the grace period is to facilitate departure from the US, and so it will be going against the intent of the rule if the individual departs and then tried to seek admission again. In the F-1 context, which provides a 60-day grace period to prepare for departure, see 8 CFR 214.2(f)(5)(iv), travelling back to the US is clearly not contemplated during this period.

Can I port to a new employer who files an H-1B petition during the 60-day grace period after my job was terminated by the old employer?

Yes. You are still considered to be maintain H-1B status during the grace period. If a new employer files the H-1B petition, you can exercise portability pursuant to INA 214(n) by commencing employment for the second employer after the H-1B petition has been filed with USCIS.

Can I request employment authorization in compelling circumstances while within the grace period?

Yes. The rule at 204.5(p) clearly states that the principal beneficiary of an approved petition when the priority date is not current can request a work authorization under compelling circumstances if the individual is in E-3, H-1B, H-1B1, O-1 or L-1 nonimmigrant status, “including the periods authorized by 214.1(l)(1) and (2)…..”

If I am unable to find a new job within the 60-day grace period, and find one after 60 days, and the new employer files the H-1B petition 80 days after the cessation of employment with my first employer, am I still eligible for an extension of H-1B status with the new employer?

The USCIS always has discretion to accept late filings based on extraordinary circumstances pursuant to 8 CFR 214.1(c)(4).

Can the USCIS give me less than 60 or 10 days of the grace period?

As noted, the USCIS can always exercise its discretion and will determine whether the facts and circumstances warrant shortening a grace period on a case by case basis. The following extract from the preamble is worth noting:

At the time a petitioner files a nonimmigrant visa petition requesting an extension of stay or change of status, DHS will determine whether facts and circumstances may warrant shortening or refusing the 60- day period on a case-by-case basis. If DHS determines credible evidence supports authorizing the grace period, DHS may consider the individual to have maintained valid nonimmigrant status for up to 60 days following cessation of employment and grant a discretionary extension of stay or a change of status to another nonimmigrant classification. See 8 CFR 214.1(c)(4) and 248.1(b). Such adjudications require individualized assessments that consider the

totality of the circumstances surrounding the cessation of employment and the beneficiary's activities after such cessation. While many cases might result in grants of 60-day grace periods, some cases may present factors that do not support the favorable exercise of this discretion. Circumstances that may lead DHS to make a discretionary determination to shorten or entirely refuse the 60-day grace period may include violations of status, unauthorized employment during the grace period, fraud or national security concerns, or criminal convictions, *among other reasons*.

The same logic would apply to the USCIS's ability to exercise discretion with respect to the 10-day grace period.

How do I apply for the 60-day grace period?

There is no specific application or form. The USCIS will make an after the fact determination when you apply for an extension of status or change of status upon the cessation of employment. It is advisable to explain that you are using the grace period in a letter or affidavit.

(This blog is for informational purposes only and should not be considered as a substitute for legal advice)